IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 2, 2005 Session

VERNON GENTRY v. TERESA ALEXANDRA GENTRY

A Direct Appeal from the Chancery Court for Cheatham County
No. 10466 The Honorable Leonard W. Martin, Chancellor

No. M2004-00640-COA-R3-CV - Filed April 18, 2005

This is an appeal from a "Final Decree of Divorce" involving the entry of a permanent parenting plan pursuant to T.C.A. §36-6-404 and limiting factors on parenting time pursuant to T.C.A. §36-6-406. Mother/Appellant asserts that the case should be remanded for entry of a permanent parenting plan because the trial court entered its own plan as opposed to one drawn by the parties. Since T.C.A. §36-6-404 does not preclude the trial court from entering its own parenting plan, this alone does not call for a remand. However, T.C.A. §36-6-404 does require the inclusion of certain provisions in any parenting plan. Since the trial court omitted some of these provisions, we remand for modification of the "Final Decree of Divorce" to comply with T.C.A. §36-6-404. The "Final Decree of Divorce" is otherwise affirmed.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified and Remanded

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

Christine Zellar Church of Clarksville, For Appellant Teresa Alexandra Gentry

Markley Runyon Gill of Erin, For Appellee Vernon Gentry

OPINION

This case began with a "Petition for Separate Maintenance," which was filed on June 15, 2000 by Vernon Gentry ("Petitioner," or "Appellee") against Teresa Alexandra Gentry ("Respondent," or "Appellant"). At the time of the filing of the "Petition for Separate Maintenance," the parties also filed a "Separate Maintenance Agreement" (the "Agreement"). The Agreement is executed by both parties. In addition to dividing marital property and debt, the Agreement provides, in relevant part, as follows concerning the care and custody of the parties' three minor children:

> 2. The parties have agreed that they shall have the joint care and custody of their three (3) minor children, David Lee Gentry, born November 4, 1987...Jonathan Ray Gentry, born September 21, 1990...and Jesse Morgan Gentry, born October 19, 1997...and that the husband, Vernon Gentry, shall be designated as primary custodian of said children. It is agreed that the wife, Teresa Alexandra Gentry, shall have extensive visitation rights with said children and shall have the children in her possession on Monday, Wednesday and Friday afternoon of each week and in addition shall have the children on alternate weekends from Friday evening until Sunday evening with the first weekend visitation beginning on May 19, 2000.
>
> 3. The parties agree that they shall cooperate with each other with regard to the exercise of the visitation and that each party shall have extensive time with the children.
>
> 4. It is agreed that the wife shall have no child support obligation designated at this time and that there exist a factual basis for a departure from the requirement of setting child support in conformity with the minimum support guidelines. The parties acknowledge that the income of the wife is insufficient to pay child support and that the husband has sufficient income in order to provide for the support and maintenance of the children. In addition, the parties recognize that the mother shall have more time with the children than is contemplated by the support guidelines.

Following the execution of this Agreement, the children remained in the marital home with Mr. Gentry and Ms. Gentry moved out. The parties continued with the custody arrangement outlined in the Agreement despite the fact that there was no court order approving or implementing the Agreement.

Two years after the filing of the Agreement, on September 24, 2002, the trial court filed a "Motion to Dismiss" due to a lack of activity on the file. At that point, Mr. Gentry's attorney contacted the parties to determine their status. Consequently, the parties signed an "Order of Separate Maintenance" approving their Agreement. However, the trial court refused to sign this "Order of Separate Maintenance" because, since Mr. Gentry's separate maintenance action had been filed, legislation had passed requiring the parties to enter into a parenting plan.[1]

In May 2003, Mr. Gentry went to California to pursue a business venture. Because he did not know if he would be back in time for the children to start school, he made arrangements with Ms.

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[1] ***See*** T.C.A. § 36-6-404 (2001) discussed *infra*. We note that this statute has been amended; however said amendments are not effective until June 30, 2005.

Gentry for her to move into the marital residence with the children pending his return from California. On June 13, 2003, while Mr. Gentry was in California, Ms. Gentry moved the trial court for an order allowing her to retract the Agreement. Ms. Gentry's Motion was heard on July 21, 2003 without Mr. Gentry being present. On July 31, 2003, the trial court entered an Order setting aside the Agreement.

In August 2003, Mr. Gentry returned from California. On August 11, 2003, Ms. Gentry filed an Answer to Mr. Gentry's "Petition for Separate Maintenance" and a Counter-Complaint for Divorce. On August 14, 2003, Ms. Gentry filed a "Petition for Orders of Protection" against Mr. Gentry. A "Ex Parte Order of Protection" was entered that same day. This Order allowed Ms. Gentry to remain in the marital home with custody of the children pending a hearing. On August 15, 2003, Mr. Gentry filed a "Motion to Set Aside Order" seeking to have the July 31, 2003 Order set aside and the Agreement between the parties reinstated because he allegedly received no notice of the July 21, 2003 hearing. On August 29, 2003, Mr. Gentry also filed a "Motion to Alter and/or Amend or Otherwise Set Aside Order Filed on July 31, 2003," which reiterates the allegations made in the August 15, 2003 Motion and also alleges that Ms. Gentry, despite her representation to the trial court, was aware of his location prior to the July 21, 2003 hearing. On September 10, 2003, Ms. Gentry filed a Response generally denying the allegations made in Mr. Gentry's Motion(s). Upon motion of Ms. Gentry, the orders of protection were extending pending a hearing.

On September 11, 2003, Mr. Gentry filed a "Motion for Primary Residential Custody and Return of Residence and Personal Property." On September 23, 2003, Ms. Gentry filed a proposed "Permanent Parenting Plan" and a "Certificate of Attendance" for a parenting class. Mr. Gentry did not file a proposed parenting plan.

An Order was entered on October 6, 2003, which dismisses the order of protection and places custody of the children with Ms. Gentry pending a full hearing. By this Order, Mr. Gentry was granted visitation and was ordered to pay Ms. Gentry $150.00 per week in child support. On October 22, 2003, Mr. Gentry filed a "Motion to Alter and Amend Based on Newly Discovered Evidence" seeking to have his $150.00 child support obligation set aside due to his alleged inability to work due to his health. On October 27, 2003, Mr. Gentry also filed an Answer to Ms. Gentry's Counter-Complaint for Divorce (which was filed August 11, 2003, *see supra*).

On November 10, 2003, Mr. Gentry filed a "Motion to Amend Complaint for Separate Maintenance." On November 18, 2003, Ms. Gentry responded to both Mr. Gentry's "Motion to Alter and Amend Based on Newly Discovered Evidence" and his "Motion to Amend Complaint for Separate Maintenance." By Order of February 9, 2004, Mr. Gentry was allowed to amend the "Complaint for Separate Maintenance" to seek an annulment of the marriage based upon a prior marriage of Ms. Gentry that had allegedly not been dissolved.

On December 16, 2003, Ms. Gentry filed a "Petition for Contempt" against Mr. Gentry for his alleged failure to pay the court-ordered child support. Mr. Gentry answered the "Petition for Contempt" on January 7, 2004.

A non-jury trial was held on January 26, 2004. On February 10, 2004, the trial court entered its "Final Decree of Divorce." In addition to granting the parties a divorce and dividing certain marital property, the "Final Decree of Divorce" (the "Decree") addresses custody and care of the minor children and, in that regard, reads, in pertinent part, as follows:

> H. The court has heard about the parties' parenting abilities and the court is not particularly pleased with either part[y's] ability to parent these children.
>
> I. The court is not happy with these parties' apparent past drug use or perhaps present drug acquaintance or use in the home of the Mother. This is all troubling to the court.
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> J. The evidence shows that the children lived with Mr. Gentry almost three years prior to him leaving for California and since Mr. Gentry returned from California Ms. Gentry has not been very good about allowing Mr. Gentry contact with the parties' minor children.
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> K. In custody cases the children can express a preference as to which parent the child would like to reside with. This is a factor for the court to consider and in this case because two of the three minor children have testified the court is going to consider their testimony.
>
> L. In light of all of the evidence before the court the court finds that Mr. Gentry is the more fit parent and therefore awards him primary custody of the parties' children.
>
> M. Ms. Gentry shall have visitation with the parties' minor children every other weekend from Friday evening at 6:00 p.m. until Sunday evening at 6:00 p.m. In addition Ms. Gentry shall have visitation at such other times as the parties can agree.
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> N. Ms. Gentry shall be allowed summer visitation with the parties' minor children for the month of July. This will begin on July 1st and end on August 1st.
>
> O. The parties will rotate the holidays as follows:

	Mother	Father
New Year's Day	Odd	Even
Easter	Even	Odd
Memorial Day (if no school)	Odd	Even

Mother's Day		Every		
Father's Day				Every
July 4th		Even		Odd
Labor Day		Odd		Even
Veteran's Day	Odd		Even	
Thanksgiving Day & Friday		Odd		Even

• The above holidays shall begin at 5:30 p.m. on the night preceding the holiday and end at 6:00 p.m. the night of the holiday except the 4th of July and this holiday ends at 10:00 p.m.

Christmas Break: The parties shall share the Christmas holiday. In even years Mother shall have the children from the day after school lets out for Christmas break at 6:00 p.m. until Christmas Day at 3:00 p.m. Father shall have the children from Christmas Day at 3:00 p.m. until New Years Day at 6:00 p.m. at which time the regular weekend visitation begins again. In odd years Father will have the children from the day after school lets out for Christmas break at 6:00 p.m. until Christmas Day at 6:00 p.m. Mother will have the children from Christmas Day at 6:00 p.m. until New Years Day at 6:00 p.m. at which time the regular weekend visitation begins again.

Thanksgiving: The parties will rotate the Thanksgiving holiday. In even years Mother will have the children for the Thanksgiving holiday. This holiday will begin on the Wednesday evening that the children get out [of] school at 6:00 p.m. and end on Friday at 6:00 p.m. In the event that Mother's weekend falls on the weekend immediately following a Thanksgiving holiday that Mother already has the children, then Mother simply keeps the children. Father will have the children in Odd years for Thanksgiving.

* The parties can agree between themselves to a different schedule so long as both parties agree. In the event that both parties do not agree, then they are to follow the court order.

P. There is an arrearage in child support owed by Mr. Gentry to Ms. Gentry as temporary child support of Two Thousand Five Hundred Fifty Dollars, $2,550.00, that has not been paid. However the court finds that Ms. Gentry has a child support obligation in this matter of One Hundred Sixty One Dollars per week, $161.00/week, and therefore the court will allow her 15.8385 weeks credit on child support. This equates to Ms. Gentry's first payment of child support being due on Friday January 30, 2004, therefore, forgiving the

following 15 weeks: (Jan. 26-Jan. 30), (31-Feb. 7), (Feb. 8-14), (Feb. 15-21), (Feb. 22-28), (Feb. 29-Mar. 6), (Mar. 7-13), (Mar. 14-20), (Mar. 21-27), (Mar. 28-April 3), (April 4-10), (April 11-17), (April 18-24), (April 25-May 1), (May 2-8), this leaves .8385 of $161.00 for the week of May 9th-15th to be paid in the amount of: $134.00. Beginning with the week of May 16th child support shall be paid at the regular rate of One Hundred Sixty One dollars per week with the support due and payable on that Friday, May 21st. The child support shall be paid by wage assignment.

* * *

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED by the Court that:

* * *

6. Vernon Gentry shall be the primary parent of the parties' three minor children.... Teresa Alexandra Gentry shall have the visitation privileges as herein set out and at such other times as the parties can agree;

7. Child support shall be paid from Teresa Alexandra Gentry to Vernon Gentry at the rate of One Hundred Sixty One Dollars per week, $161.00 per week as set above allowing Ms. Gentry certain credit for the child support arrearage of Mr. Gentry.

Ms. Gentry appeals from the Decree and raises four issues for review as stated in her brief:

A. Whether this case must be remanded for entry of a parenting plan, and parental rights.

B. Whether the court erred by making no findings concerning limiting factors on the Father's time.

C. Whether the court erred by making the Father the primary residential parent.

D. Whether the court erred by restricting the Mother's time so severely.

Since this case was tried by a court sitting without a jury, we review the case de novo upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. ***See*** Tenn. R.App. P. 13(d).

Parenting Plan

T.C.A. §36-6-404 (2001) requires that "[a]ny final decree...in an action for absolute divorce...involving a minor child shall incorporate a permanent parenting plan." T.C.A. §36-6-402(3) (2001) defines "Permanent Parenting Plan"as "a written plan for the parenting and best interests of the child including the allocation of parenting responsibilities and the establishment of a residential schedule, as well as an award of child support...." Although the statutory definition of "Permanent Parenting Plan" does not specifically require that such plan be drafted in whole or in part by the parties, it is clear from the language of T.C.A. §36-6-404 that the legislature contemplated a scenario whereby the parents of the minor children would convene to reach some mutually agreeable parenting plan that meets the criteria set out in the statute and is also in the best interests of the children. Once such an agreement is reached, the statute contemplates the trial court's implementation of the parenting plan by incorporation into the final decree. However, there are certainly times when divorcing or separating parties can have difficulty achieving a meeting of the minds on any subject. Consequently, in T.C.A. §36-6-404(c), the legislation addresses those instances where the parties cannot agree as to a permanent parenting plan and the trial court must intervene, to wit:

> (c) The court shall approve a permanent parenting plan as follows:
>
> * * *
>
> (2) If the parties cannot reach agreement on a permanent parenting plan, upon the motion of either party, or upon its own motion, the court may order appropriate dispute resolution proceedings pursuant to Rule 31 of the Rules of the Supreme Court, to determine a permanent parenting plan; or
>
> (3) If the parties have not reached agreement on a permanent parenting plan on or before forty-five (45) days before the date set for trial, each party shall file and serve a proposed permanent parenting plan, even though the parties may continue to mediate or negotiate. Failure to comply by a party may result in the court's adoption of the plan filed by the opposing party if the court finds such plan to be in the best interests of the child. In determining whether the proposed plan is in the best interests of the child, the court may consider the allocation of residential time and support obligations contained in the child support guidelines and related provisions contained in chapter

> 5 of this title. Each parent submitting a proposed permanent parenting plan shall attach a verified statement of income pursuant to the child support guidelines and related provisions contained in title 36, chapter 5, and a verified statement that the plan is proposed in good faith and is in the best interest of the child.

In the instant case, Ms. Gentry filed a proposed "Permanent Parenting Plan" on September 23, 2003. Mr. Gentry did not file a proposed parenting plan. Pursuant to T.C.A. §36-6-404(c)(2), the trial court, while keeping the best interests of these children at the forefront of its consideration, could have adopted Ms. Gentry's proposed parenting plan in whole or in part, or could have established its own parenting plan. The trial court here opted to establish its own parenting plan, which is set out in the "Final Decree of Divorce" *supra*.

Despite the fact that the parties' inability or unwillingness to reach a permanent parenting plan does not preclude the trial court from entering its own under the statute, any permanent parenting plan, incorporated into a final divorce decree, must contain certain provisions as set out in T.C.A. §36-6-404(a) and (b), to wit:

> (a) ...A permanent parenting plan shall:
>
> (1) Provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for further modifications to the permanent parenting plan;
>
> (2) Establish the authority and responsibilities of each parent with respect to the child, consistent with the criteria in this part;
>
> (3) Minimize the child's exposure to harmful parental conflict;
>
> (4) Provide for a process for dispute resolution, before court action, unless precluded or limited by § 36-6-406; provided, that state agency cases are excluded from the requirement of dispute resolution as to any child support issue involved. In the process for dispute resolution:
>
> > (A) Preference shall be given to carrying out the parenting plan;
> > (B) The parents shall use the designated process to resolve disputes relating to the implementation of the plan;
> > (C) A written record shall be prepared of any agreement reached in mediation, arbitration, or settlement conference and shall be provided to each

party to be drafted into a consent order of modification;

(D) If the court finds that a parent willfully failed to appear at a scheduled dispute resolution process without good reason, the court may, upon motion, award attorney fees and financial sanctions to the prevailing parent;

(E) The provisions of this subsection (a) shall be set forth in the decree; and

(F) Nothing in this part shall preclude court action, if required to protect the welfare of the child or a party;

(5) Allocate decision-making authority to one (1) or both parties regarding the child's education, health care, extracurricular activities, and religious upbringing. The parties may incorporate an agreement related to the care and growth of the child in these specified areas, or in other areas, into their plan, consistent with the criteria in this part. Regardless of the allocation of decision making in the parenting plan, the parties may agree that either parent may make emergency decisions affecting the health or safety of the child;

(6) Provide that each parent may make the day-to-day decisions regarding the care of the child while the child is residing with that parent;

(7) Provide that when mutual decision making is designated but cannot be achieved, the parties shall make a good-faith effort to resolve the issue through the appropriate dispute resolution process, subject to the exception set forth in subdivision (a)(4)(F);

* * *

(9) Specify that if the driver license of a parent is currently expired, canceled, suspended or revoked or if the parent does not possess a valid driver license for any other reason, the parent shall make acceptable transportation arrangements as may be necessary to protect and ensure the health, safety and welfare of the child when such child is in the custody of such parent.

(b) Any permanent parenting plan shall include a residential schedule as defined in § 36-6-402(3).[2] The court shall make residential provisions for each child, consistent with the child's developmental level and the family's social and economic circumstances, which encourage each parent to maintain a loving, stable, and nurturing relationship with the child. The child's residential schedule shall be consistent with this part. If the limitations of § 36-6-406 are not dispositive of the child's residential schedule, the court shall consider the following factors:

> (1) The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society which the child faces as an adult;
> (2) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child;
> (3) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child;
> (4) Willful refusal to attend a court-ordered parent education seminar may be considered by the court as evidence of that parent's lack of good faith in these proceedings;
> (5) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;
> (6) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;
> (7) The love, affection, and emotional ties existing between each parent and the child;

[2] T.C.A. §36-6-402(3) defines "Residential schedule" as "the schedule of when a child is in each parent's physical care, and it shall designate the primary residential parent; in addition, the residential schedule shall designate in which parent's home each minor child shall reside on given days of the year, including provisions for holidays, birthdays of family members, vacations, and other special occasions consistent with the criteria of this part; provided, that nothing contained herein shall be construed to modify any provision of §36-6-108."

> (8) The emotional needs and developmental level of the child;
> (9) The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child;
> (10) The child's interaction and interrelationships with siblings and with significant adults, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;
> (11) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
> (12) Evidence of physical or emotional abuse to the child, to the other parent or to any other person;
> (13) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;
> (14) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;
> (15) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and
> (16) Any other factors deemed relevant by the court.

In reviewing the trial court's Decree it is apparent that the trial court failed to include certain of the above provisions in its parenting plan. Specifically, the trial court failed to incorporate provisions addressing the decision-making responsibilities of each of these parties as required under T.C.A. §36-6-404(a)(5)-(7), *supra*. In addition, the trial court failed to address the transportation provision requirements of T.C.A. §36-6-404(a)(9). Finally, the trial court failed to include provisions concerning dispute resolution. T.C.A. §36-6-402(1) defines "Dispute resolution" as follows:

> "Dispute resolution" means the mediation process or alternative dispute resolution process in accordance with Supreme Court Rule 31 unless the parties agree otherwise. For the purposes of this part, such process may include: mediation, the neutral party to be chosen by the parties or the court; arbitration, the neutral party to be chosen by the parties or the court; or a mandatory settlement conference presided over by the court or a special master.

Because T.C.A. §36-6-404 specifically requires any permanent parenting plan to incorporate all of the provisions set out above, we must remand to the trial court for modification of it's the Decree to include the omitted requirements.

In addition to the mandatory provisions, which are outlined in T.C.A. §36-6-404 and are to be included in every permanent parenting plan, T.C.A. §36-6-101(a)(3) (Supp. 2004) addresses additional parental rights that ***may*** be given to parents during those times when the child(ren) are not in the physical custody of that parent. These rights include the following:

> (3) Except when the court finds it not to be in the best interests of the affected child, each order pertaining to the custody or possession of a child arising from an action for absolute divorce, divorce from bed and board or annulment shall grant to each parent the rights listed in subdivisions (3)(A)- (F) during periods when the child is not in that parent's possession or shall incorporate such rights by reference to a prior order. Other orders pertaining to custody or possession of a child may contain the rights listed in subdivisions (3)(A)-(F). The referenced rights are as follows:
>
> (A) The right to unimpeded telephone conversations with the child at least twice a week at reasonable times and for reasonable durations;
>
> (B) The right to send mail to the child which the other parent shall not open or censor;
>
> (C) The right to receive notice and relevant information as soon as practicable but within twenty-four (24) hours of any event of hospitalization, major illness or death of the child;
>
> (D) The right to receive directly from the child's school upon written request which includes a current mailing address and upon payment of reasonable costs of duplicating, copies of the child's report cards, attendance records, names of teachers, class schedules, standardized test scores and any other records customarily made available to parents;
>
> (E) Unless otherwise provided by law, the right to receive copies of the child's medical, health or other treatment records directly from the physician or health care provider who provided such treatment or health care upon written request which contains a current mailing address and upon payment of reasonable costs of duplication; provided, that no person who receives the mailing address of a parent

> as a result of this requirement shall provide such address to the other parent or a third person;
>
> (F) The right to be free of unwarranted derogatory remarks made about such parent or such parent's family by the other parent to or in the presence of the child;
>
> (G) The right to be given at least forty-eight (48) hours notice, whenever possible, of all extra-curricular activities, and the opportunity to participate or observe, including, but not limited to, the following:
>
> (i) School activities;
>
> (ii) Athletic activities;
>
> (iii) Church activities; and
>
> (iv) Other activities as to which parental participation or observation would be appropriate;
>
> (H) The right to receive from the other parent, in the event the other parent leaves the state with the minor child or children for more than two (2) days, an itinerary including telephone numbers for use in the event of an emergency; and
>
> (I) The right of access and participation in education, including the right of access to the minor child or children for lunch and other activities, on the same basis that is provided to all parents, provided the participation or access is reasonable and does not interfere with day-to-day operations or with the child's educational performance. ***Any of the foregoing rights may be denied in whole or in part to one or both parents by the court upon a showing that such denial is in the best interests of the child***. Nothing herein shall be construed to prohibit the court from ordering additional rights where the facts and circumstances so require.

T.C.A. §36-6-101(a)(3) (emphasis added).

Although Ms. Gentry asserts that T.C.A. §36-6-101(a)(3) requires the trial court to grant her the rights contained therein, the statute is clear that the granting or denial of these rights is contingent upon the best interests of the child(ren). That being said, the statute is clear that these rights should be granted absent a finding that it is not in the child(ren)'s best interest to do so. Consequently, upon

remand, the lower court should engage in a best interest analysis to determine whether and to what extent the above rights should be granted or denied to these parties.

We now turn to Appellant's remaining issues, which involve the residential schedule set out in the trial court's Decree. We first address the issue of whether the trial court erred in awarding primary residential custody of the children to Mr. Gentry.

Primary Residential Parent

In child custody and visitation cases, the welfare and best interests of the child are paramount concerns. ***Whitaker v. Whitaker***, 957 S.W.2d 834, 837 (Tenn. Ct. App.1997); T.C.A. § 36-6-106 (2001). The determination of the child's best interest must turn on the particular facts of each case. ***Taylor v. Taylor***, 849 S.W.2d 319, 326 (Tenn.1993); ***In re Parsons***, 914 S.W.2d 889, 893 (Tenn. Ct. App.1995). In ***Bah v. Bah***, 668 S .W.2d 663 (Tenn. Ct. App.1983), the Court established some guidelines for making the determination of the child's best interest:

> We adopt what we believe is a common sense approach to custody, one which we will call the doctrine of "comparative fitness." The paramount concern in child custody cases is the welfare and best interest of the child. ***Mollish v. Mollish***, 494 S.W.2d 145, 151 (Tenn. Ct. App.1972). There are literally thousands of things that must be taken into consideration in the lives of young children, ***Smith v. Smith***, 188 Tenn. 430, 437, 220 S.W.2d 627, 630 (1949), and these factors must be reviewed on a comparative approach:
>
> > Fitness for custodial responsibilities is largely a comparative matter. No human being is deemed perfect, hence no human can be deemed a perfectly fit custodian. Necessarily, therefore, the courts must determine which of two or more available custodians is more or less fit than others. ***Edwards v. Edwards***, 501 S.W.2d 283, 290-91 (Tenn.Ct.App.1973).

Bah, 668 S.W.2d at 666.

The trial court must also consider factors set forth in T.C.A. § 36-6-106 (2001), which provides, in relevant part, as follows:

> The court shall consider all relevant factors including the following where applicable:
> (1) The love, affection and emotional ties existing between the parents and child;

> (2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
> (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; provided, that where there is a finding, under § 36-6-106(8), of child abuse, as defined in § 39- 15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, by one (1) parent, and that a non-perpetrating parent has relocated in order to flee the perpetrating parent, that such relocation shall not weigh against an award of custody;
> (4) The stability of the family unit of the parents;
> (5) The mental and physical health of the parents;
> (6) The home, school and community record of the child;
> (7) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;
> (8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that where there are allegations that one (1) parent has committed child abuse, [as defined in § 39-15-401 or § 39-15-402], or child sexual abuse, [as defined in § 37-1-602], against a family member, the court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of fact connected thereto. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;
> (9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and
> (10) Each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

The presumption of correctness applicable to a trial court's findings of fact pursuant to Tenn. R. App. P. 13(d), ***see*** *supra*, applies in child custody cases. ***Hass v. Knighton***, 676 S.W.2d 554, 555 (Tenn.1984); ***Whitaker***, 957 S.W.2d at 838.

In this case, both of the older children, David and Johnny, testified that his preference was to live with Ms. Gentry. It is apparent from the trial court's Decree, that the preferences of the children were considered in reaching a residential schedule. However, we note that, although the "reasonable preference" of a child aged twelve years or older is a factor to be considered by the court under T.C.A. § 36-6-106, such preference is not controlling or binding upon the court, or the controlling factor. ***Hardin v. Hardin***, 979 S.W.2d 314, 317 (Tenn. Ct. App.1998) (quoting ***Smith v. Smith***, No. 01A01-9511-CH-00536, 1996 WL 526921, at *4 (Tenn. Ct. App. Sept. 18, 1996)); ***Wall v. Wall***, 907 S.W.2d 829, 834 (Tenn.Ct.App.1995).

From our review of the record, it is apparent that the trial court's decision to award primary residential custody to Mr. Gentry was based upon the court's concern arising from drug use in Ms. Gentry's home and from Ms. Gentry's apparent unwillingness to allow Mr. Gentry contact with the children during his time in California or upon his return to Tennessee. Concerning drug use, the record indicates that, at some point, both Mr. Gentry and Ms. Gentry were involved in drug use and/or activity. However, both parties testified that they have not used drugs in some time. However, Ms. Gentry testified as follows concerning an incident where Johnny Gentry, the middle child, found a marijuana cigarette in her home:

> And Johnny found a half smoked marijuana cigarette in the bathroom one day. I don't remember if it was in the bathroom or in the living room. I forget where it was that he found it, and he asked me about it. And he asked me what it was.
>
> I told him what it was. I knew what it was. And I said, you know, it must be Jimmy's [Mr. Gentry's 43 year old son from a previous relationship. At the time of this incident, Jimmy Gentry was renting a room from Ms. Gentry]. And I asked Jimmy about it, and Jimmy kind of hemhawed (ph) about it. And I told him, you know, that he couldn't do that in this house, and he moved out soon after that.

Although there is nothing in this record to indicate that Ms. Gentry was using drugs, under T.C.A. § 36-6-106 above, the trial court must consider "[t]he character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child." Consequently, this factor weighs against Ms. Gentry.

From the record, it is clear that these children love both of their parents. It is also clear that each of the children has experienced some stress due to their parents' separation. There is evidence in the record to support the trial court's finding that Ms. Gentry **"**has not been very good about allowing Mr. Gentry contact with the parties' minor children." The testimony indicates that she has gone so far as to block the phone numbers Mr. Gentry tried to use to call and speak with the children. Furthermore, she has denied him access to the house where he lived with the children prior to his trip to California. Consequently, Mr. Gentry has been left without a house and with no place to exercise overnight visitation with the children. Based upon the record before us, the statutory factor

concerning "the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child" weighs heavily against Ms. Gentry.

While we agree with the trial court's assessment that neither of these parties is an ideal parent, when reviewing the particular facts of this case in light of the statutory factors and in light of the best interests of these children, we cannot say that the evidence preponderates against the trial court's finding that Mr. Gentry should be the primary residential parent.

Limiting Factors

Ms. Gentry asserts that Mr. Gentry's residential time should be limited based upon at least two of the limiting factors found in T.C.A. §36-6-406 (2001). The statute reads, in pertinent part, as follows:

> (a) ...[A] parent's residential time as provided in the permanent parenting plan or temporary parenting plan shall be limited if it is determined by the court, based upon a prior order or other reliable evidence, that a parent has engaged in any of the following conduct:
>
> (1) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting responsibilities; or

Ms. Gentry first asserts that Mr. Gentry willfully abandoned the children when he left Tennessee for California. At the conclusion of the hearing, the trial court made the following relevant statement concerning Mr. Gentry's move to California:

> Now another thing that I'm concerned about is they're in dispute about this business about, he [Mr. Gentry] was gone. He wasn't coming back. Or she was supposed to look after the house and his kids until he came home. Somehow, he came back and he was going to be gone about two weeks. Who knows.
>
> One or the other, or both of them, is probably not telling it exactly like it was. But he did come back....

There is definitely dispute in this record concerning Mr. Gentry's intent when he left for California. He is adamant that he was definitely planning to return to Tennessee, although he did not know exactly when that would be, to wit:

> I [Mr. Gentry] went out there [to California], I think it was the last of May, and I wasn't sure how long I was going to be out there. So I asked her [Ms. Gentry] if she would mind watching the kids....

> And I told her–I said, I don't know if I'll be back in time for school to start. Would you be willing to rent...my house from me? And that way, the kids wouldn't have to change schools if I didn't make it back in time. She said, sure.
>
> So she paid me two months rent in advance. And I didn't expect to be gone more than two months. I was gone a little over two months. And while I was out there, I called the kids at least twice a week and talked to them. And I even spoke to her one or two times, and then she wouldn't answer the phone, to see if the kids were there.

Ms. Gentry asserts that, when Mr. Gentry left Tennessee in May 2003, he had no plan to return. Ms. Gentry testified that Mr. Gentry told her that he wanted to leave Cheatham County because he couldn't make any money there. Other witnesses such as Robert Guy, Sr., Mr. Gentry's landlord for his Cheatham County business, and Charles Wallace Pardue, an acquaintance of Mr. Gentry's for some fifteen years, also testified that Mr. Gentry had indicated to them that he was moving but that he did not indicate whether or when he would return. The fact remains, however, that Mr. Gentry did return to Tennessee. The statute clearly indicates that willful abandonment must "[continue] for an extended period of time" in order to constitute a limiting factor in these cases.

As to the question of whether Mr. Gentry's initial intent in leaving Tennessee was to abandon these children, it is well settled that when the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to observe the witnesses in their manner and demeanor while testifying is in a far better position than this Court to decide those issues. ***McCaleb v. Saturn Corp.***, 910 S.W.2d 412, 415 (Tenn.1995); ***Whitaker v. Whitaker***, 957 S.W.2d 834, 837 (Tenn. Ct. App.1997). The weight, faith, and credit to be given to any witness's testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. ***Id.***; ***In re Estate of Walton v. Young***, 950 S.W.2d 956, 959 (Tenn.1997). In reviewing the record, we cannot say that the evidence preponderates against the trial court's finding that Mr. Gentry did not abandon his children.

Ms. Gentry further argues that, during his stay in California, Mr. Gentry neglected his parenting responsibilities. T.C.A. §36-6-402(2) defines "Parenting responsibilities" as follows:

> (2) "Parenting responsibilities" means those aspects of the parent-child relationship in which the parent makes decisions and performs duties necessary for the care and growth of the child. "Parenting responsibilities," the establishment of which is the objective of a permanent parenting plan, include:
>
> (A) Providing for the child's emotional care and stability, including maintaining a loving, stable, consistent, and nurturing relationship with the child and supervising the child to encourage and protect emotional, intellectual, moral, and spiritual development;

> (B) Providing for the child's physical care, including attending to the daily needs of the child, such as feeding, clothing, physical care, and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;
>
> (C) Providing encouragement and protection of the child's intellectual and moral development, including attending to adequate education for the child, including remedial or other education essential to the best interests of the child;
>
> (D) Assisting the child in developing and maintaining appropriate interpersonal relationships;
>
> (E) Exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and
>
> (F) Providing any financial security and support of the child in addition to child support obligations;

A limiting factor exists when a parent "substantially refuses" to perform his or her parenting responsibilities. The evidence in record indicates that, prior to his move to California, Mr. Gentry was a good father to these children, actively involved in their home, school, and social activities. The evidence is that he supported them both emotionally and financially. During his time in California, the evidence indicates that he did strive to maintain contact with the children but that his efforts were often intercepted by Ms. Gentry's refusal to take telephone calls from Mr. Gentry. Looking at the totality of the circumstances in this case, we cannot conclude that the evidence supports a finding that Mr. Gentry either willfully abandoned or substantially failed to perform his parenting responsibilities in regard to these children.

Ms. Gentry's Visitation

Ms. Gentry asserts that the trial court erred in not granting her more extensive visitation with the children. Having reviewed the record, we do not find that the residential schedule outline in the trial court's Order is unfair to Ms. Gentry. Furthermore, it is clear that the trial court recognized the fact that these children love both of their parents and that the children would be better served to have open and ample visitation with both parents. To that end, the court's Order states that "[t]he parties can agree between themselves to a different schedule so long as both parties agree. In the event that both parties do not agree, then they are to follow the court order." It was obviously the hope of the lower court, as it is the hope of this Court, that the parties will be generous with one another in terms

of time spent with the children. Such cooperation will not only inure to the benefit of the parties but will, more importantly, be in the best interests of these children. That being said, however, if the parties cannot cooperate, this Court, after reviewing the relevant facts and factors, finds that the trial court's residential schedule is fair and workable.

We remand this case to the trial court for modification of its "Final Decree of Divorce" to comply, consistent with this Opinion, with the statute concerning parenting plans. The "Final Decree of Divorce" is affirmed in all other respects. Costs of this appeal are assessed against the Appellant, Teresa Alexandra Gentry, and her surety.

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W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.